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No. 90-1892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
vs.
PATRICK M. O'RILEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL E. CAMPBELL, JR.
Counsel of Record

NEIL E. CAMPBELL, JR.
A Professional Law Corporation

2271 Torrance Boulevard
Torrance, California 90501
(213) 533-6125

Attorney for Respondent
PATRICK M. O'RILEY

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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QUESTION PRESENTED

Need this court again review a California intermediate appellate decision which merely follows the mandate of this court in Tafflin v. Levitt, 493 U.S. ____, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) in holding that state courts may exercise concurrent jurisdiction over claims made under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, et seq.?

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STATEMENT OF THE CASE

The decision of the Court of Appeal sets forth fully and accurately the history of this case. However, a brief synopsis suffices:

After a three-week jury trial in Los Angeles Superior Court, defendant O'Riley, who, pursuant to contract, operated a gasoline station franchise, was given a judgment against Union Oil Company of California ("Union"), O'Riley's franchisor, on his cross-complaint for breach of the notice and termination provisions of the PMPA.

Only after the trial judge concurred in the jury's determination that Union's breach of the PMPA was willful and deliberate and awarded punitive damages, plus costs and attorneys' fees, did Union

first claim that the state court lacked jurisdiction over PMPA claims.

Union appealed, raising the jurisdictional issue. While the appeal was pending, Union raised the same issue in another appeal, without informing counsel, so that the issue could be joined by all interested parties, and procured the decision in Niakan v. Samaan, 199 Cal.App.3d 716, cert. denied, 103 L.Ed.2d 572 (1988). Niakan followed the U.S. District Court case of Rustom v. Atlantic Richfield Co., 618 F.Supp. 210 (C.D. Cal. 1985) in holding that jurisdiction over PMPA claims is exclusively federal. As could be expected, the Court of Appeal in this case, initially simply followed its earlier ruling in Niakan.

After review was denied by the California Supreme Court, O'Riley then petitioned this court, which granted certiorari, reversed the Court of Appeal decision below, awarded O'Riley costs and ordered that the Court of Appeal reconsider its decision in light of Tafflin v. Levitt, 493 U.S. _____, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), which held that the states have concurrent jurisdiction over RICO private actions, and discusses extensively the presumption in favor of concurrent jurisdiction and the reasons which support the presumption.

Following the order of this court, on remand, the Court of Appeal reconsidered and decided that Tafflin mandates concurrent state and federal jurisdiction over

PMPA claims.

Now, following denial of review by the California Supreme Court, Union asks this court to again review this case.

REASONS FOR DENYING THE WRIT

I. While A Conflict in Decisions Exists, Such Conflict Is Not Ripe For Disposition By This Court, As This Court's Guidance In Tafflin v. Levitt Has Not Yet Been Considered By The Lower Courts.

Union suggests that because a conflict exists between the state courts of last resort in Pennsylvania (Johnson v. Mobil Oil Corporation (1989) 560 A.2d 124) and Maine, C.N. Brown Co. v. Gillen, (1990) 569 A.2d 1206, this court should resolve that conflict by granting its petition for certiorari.

This argument is disingenuous because it overlooks the obvious. Clearly this court intended its decision in Tafflin v. Levitt, supra, 493 U.S. _____, 110 S.Ct.

792, 107 L.Ed.2d 887 (1990), to provide guidance to both state and federal courts on the question of concurrent versus exclusive jurisdiction. The previous grant of certiorari and remand to the California Court of Appeal in this case shows that the justices of this court view the reasoning of Tafflin as important new information for lower courts to consider on the question of whether a federal statute gives rise to concurrent jurisdiction.

For the simple reason that both the Pennsylvania and Maine cases precede this court's decision in Tafflin, they do not evaluate the question of jurisdiction in light of this court's reasoning. Accordingly, there is no conflict in decisions interpreting Tafflin, nor any

conflict among courts on the question of state court jurisdiction over PMPA claims, post-Tafflin. Because the conflict which exists is pre-Tafflin, it is not ripe for disposition by this court, which presumably would simply repeat its Tafflin reasoning.

II. The Court Below Correctly Followed the Reasoning Of This Court In Tafflin, Which Mandates The Holding That Jurisdiction Over PMPA Claims Is Concurrent.

In Tafflin the United States Supreme Court clarifies the strong presumption in favor of concurrent jurisdiction, rejecting arguments in favor of exclusive jurisdiction based on legislative intent, unless the jurisdictional issue is specifically debated by Congress.

Thus, this court reasoned:

> "Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. . . ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction." Tafflin, supra, 107 L.Ed.2d at 895-6.

Despite this court's clear exposition in Tafflin, Union cites debate by Con-

gressmen, who never mention jurisdiction, but merely argue the need for nationally uniform legislation.

The California Court of Appeal correctly characterized Union's citations as "random comments made during presentation of the legislation which do not directly discuss whether legislation "ousts the state courts of jurisdiction". . . (See page A 5 of Union's Petition for Writ of Certiorari.)

Union confuses a need for nationally uniform rules, which Congress must perceive whenever it passes controlling legislation, with the question of whether Congress intended to deprive the state courts of jurisdiction to enforce the PMPA. On the latter question, Congress was silent, and the reasoning of Tafflin

controls.

Furthermore, Union's argument implies that only federal judges may be trusted to enforce uniform national rules. It shows a deep distrust in state court judges, a distrust which Tafflin makes clear is not shared by this court. "Moreover contrary to petitioner's fear, we have full faith in the ability of state courts to handle the complexities of civil RICO actions. . ." Tafflin, supra, at 107 L.Ed.2d 898.

Finally, Union ignores the major thrust of Tafflin, that where Congress seeks to remedy a perceived national wrong, confinement of claims to the federal courts alone may frustrate Congress' broad remedial purpose. The PMPA was enacted to establish "protection for franchisees

from arbitrary or discrimination termination or non-renewal of their franchises". (S.Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 874) and to alleviate "the inherent disparity of bargaining power which exists between the franchisor and the franchisee" (S.Rep. No. 731, supra, at 17).

As this court stated in Tafflin:

> "Finally, we note that, far from disabling or frustrating federal interests, "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." Gulf Offshore, 453 US, at 478, n 4, 69 L.Ed.2d 784, 101 S.Ct. 519 (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, e.g., Pub.L. 91-452, § 904(a), 84 State. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); Sedima, 473 U.S., at 492, n. 10, 87 L.Ed.2d 346, 105 S.Ct. 3275 ("[I]f Congress' liberal-

construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather jeopardize federal policies underlying the statute."

III. Union's Petition For Writ of Certiorari Should Not Be Granted, To Avoid Putting the Imprimatur Of This Court On Union's Unethical Legal Strategy.

In this case, Union waited until after the state jury completed its deliberation following a three-week jury trial, and the judge awarded punitive damages for Union's willful breach of the PMPA, to then, for the first time, claim that the state trial court lacked jurisdiction over O'Riley's PMPA claims.

An ethical, good-faith litigant would have raised the issue before trial, so as

to avoid thousands of dollars of costs and hours of lost time.

While it is indisputable that jurisdiction cannot be waived, and can be raised even in this court, for the first time, it is also indisputable that if ever a litigant could be said to have agreed to a state forum, it is Union in this case. Union brought suit in state court. It waited to raise the issue of jurisdiction until after it lost.

Under the circumstances, Union's petition should be denied so as not to put the imprimatur of this court on Union's unethical legal posture.

CONCLUSION

This court need not again review this case. The California Court of Appeal has

now followed the guidance provided by this court in Tafflin. No conflict in decision exists post-Tafflin. Finally, this court should not grant Union's petition so as not to sanction Union's unethical strategy.

Respectfully submitted,

NEIL E. CAMPBELL, JR.
Attorney for Respondent